

Noppawong (Migration) [2019] AATA 6626 (17 December 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Tinlawong Noppawong

CASE NUMBER: 1822174

HOME AFFAIRS REFERENCE(S): BCC2018/352041

MEMBER: Joseph Lindsay

DATE: 17 December 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

- 1.
2. Statement made on 17 December 2019 at 2:47pm
- 3.

CATCHWORDS

MIGRATION – cancellation – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – non-appearance before the Tribunal – ground for cancellation – fact or circumstance no longer exist – member of family unit – relationship with primary visa holder ceased – consideration of discretion – failure to advise the Department of changed circumstances – decision under review affirmed

4.

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 5F, 116

Migration Regulations 1994 (Cth), r 1.12

5.

6.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

7. This is an application for review of a decision dated 30 July 2018 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 500 (Student) visa under s.116(1)(a) of the *Migration Act 1958* (the Act).
8. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled. In his application, the applicant provided a copy of the Department's decision dated 30 July 2018.
9. The applicant was invited to have a hearing before the Tribunal on 17 December 2019 at 1:30pm. However, the applicant failed to appear for the hearing.
10. A hearing invitation was emailed to the applicant's appointed agent on 26 November 2019. Two SMS messages about the hearing were sent to the mobile phone number provided by the applicant.
11. However, the applicant did not attend the hearing and the agent did not attend the hearing. There has been no further contact at all from either the applicant or the agent with the Tribunal.
12. If the applicant had appeared at the hearing, the Tribunal would have had the opportunity to ask questions of the applicant. The Tribunal would have had the opportunity to ask the applicant if it was still the situation that he was no longer in a married relationship with the primary visa holder, Chayanid Ruangkaew.
13. The Tribunal would have had the opportunity to ask the applicant if he considered himself to be a member of a member of the family unit of Chayanid Ruangkaew as prescribed by Regulation 1.12 of the Migration Regulations 1994, and whether he considered himself to be either a spouse or a defacto partner of that person as defined respectively by sections 5F and 5CB of the Act.
14. However, the Tribunal was not able to ask the applicant any of these questions. Accordingly, the Tribunal has decided to make a decision on the available evidence.
15. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.
17. In his application for review, the applicant provided the delegate's decision record dated 30 July 2018 to the Tribunal.
18. As indicated above, the student visa was granted on the basis the application met, amongst other criteria, the secondary criteria for this visa as a member of Chayanid Ruangkaew's family unit, as prescribed by Regulation 1.12 of the Migration Regulations 1994.

19. To be a member of the family unit of Chayanid Ruangkaew as prescribed by Regulation 1.12 of the Migration Regulations 1994, the applicant needed to continue to be either a spouse or a defacto partner of that person as defined respectively by sections 5F and 5CB of the Act.
20. Information from the delegate's decision record dated 30 July 2018 indicates that on 17 December 2017 the Department received advice from the primary visa holder, Chayanid Ruangkaew advising her married relationship with the applicant had ended.
21. This information indicates that the applicant and the primary visa holder, Chayanid Ruangkaew:
 - No longer have a mutual commitment to a shared life together to the exclusion of all others.
 - No longer have a genuine and continuing relationship.
 - Live separately on a permanent basis.
22. It appears the applicant no longer meets the definition in the Migration Regulations 1994 of being in either a married or de facto relationship with the primary visa holder, and no longer meet the definition of being a member of her family unit.
23. This key circumstance of being in either a married or de facto relationship with the primary visa holder who held a Student visa, that had enabled the applicant to meet the requirements for the grant of the visa, no longer exists.
24. Accordingly, the applicant's visa may be cancelled under paragraph 116(1)(a) which sets out the following ground for cancellation:
 25. *Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:*
 26. *(a) the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists.*
27. For these reasons, the Tribunal is satisfied that the ground for cancellation in s.116(a) of the Act exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of the discretion to cancel the visa

28. Having found that the applicant has not complied with a condition of the visa, the Tribunal must consider whether the visa should be cancelled. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'
29. **The circumstances in which the ground for cancellation arose**
30. The Tribunal notes that the applicant responded to the Notice of Intent to Consider Cancellation (NOICC). In his response he indicated, in summary, that
 - He came to Australia to improve his English skills and pursue a degree in management.

- He holds a Bachelor degree in Information Technology (IT) and he worked for a big IT company in Thailand for five years.
- He came to Australia with his wife who at that time was his girlfriend and they got married on 4 April 2017.
- After sometime in their relationship, he started to see a change in his wife's behaviour.
- He found out his wife was in another relationship.

31. In respect to the above information, the Tribunal makes the following findings:

- The Tribunal reasonably expects that when the applicant was granted their visa, they reasonably knew that they were granted the visa on the basis of being a member of the family unit of the primary visa holder, and that they would have realised that this change of circumstances would have impacted on his eligibility to continue to hold the student visa.
- The applicant had sufficient opportunity, over seven months, since the change of circumstance occurred in which to contact the Department to explain his changed circumstances and to ask about his visa status and options – yet there is no indication that he contacted the Department to advise them accordingly.
- Although the initial circumstance that led to the ground for cancellation arising may have been due to circumstances beyond the visa holder's control, the Tribunal does not accept that the applicant's omission to contact the Department to advise them of his changed circumstances was due to circumstances beyond his control.

32. In consideration of the above circumstances, the Tribunal finds that these circumstances are not exceptional circumstances. Accordingly, the Tribunal places high weight on this information against the applicant.

33. The purpose of the visa holder's travel and stay in Australia; whether the visa holder has a compelling need to travel to or remain in Australia

34. On 27 July 2017 the applicant was granted a TU500 student visa for the purpose of being able to accompany and remain in Australia temporarily with the primary visa holder, Chayanid Ruangkaew with whom they were in a married relationship.
35. In his response the NOICC, the applicant affirmed his desire to pursue his studies in Australia. Whilst the Tribunal acknowledges that the applicant's wish was to study in Australia, this is not to purpose for which he was granted his visa.
36. Accordingly, the Tribunal finds that the applicant has no compelling need to travel to or remain in Australia and the Tribunal gives low weight in the applicant's favour in regard to this factor.

37. The extent of compliance with visa conditions

38. The Tribunal finds that the applicant appears to have complied with his visa conditions, apart from condition 8514 that states that during the visa period of the visa, there must be no material change in the circumstances on the basis of which it was granted. However, there was a material change in the circumstances on the basis of which the visa was granted because the applicant and Chayanid Ruangkaew ceased to be in a married relationship – and he did not tell the Department.
39. Accordingly, the Tribunal gives no weight in the applicant's favour in regard to this factor.

40. Degree of hardship that may be caused (financial, psychological, emotional or other hardship)

41. In his response the NOICC, the applicant indicated that the hardship caused to him if his visa were to be cancelled is:
- He will no longer be able to further his studies in Australia.
 - He will not be able to make his parents proud.
 - He will be returned to Thailand and will not be able to have a good job.
42. The Tribunal accepts that the applicant would face stress and emotional hardship if his visa was cancelled and gives this some weight.

43. Past and present behaviour of the applicant towards the Department

44. There is no evidence that the applicant has been uncooperative with the Department in the past. The Tribunal accepts that there is no evidence that the applicant has been uncooperative with the Department in the past. Having taken this into consideration, the Tribunal gives this consideration some weight in the applicant's favour.

45. Whether there would be consequential cancellations under s.140

46. There is no indication that there will be any consequential cancellations by operation of law under section 140 of the Act of the visa of any other person. Accordingly, the Tribunal places no weight on this information in the applicant's favour.

47. Whether there are mandatory legal consequences, such as whether cancellation would result in the visa holder being unlawful and liable to detention, or whether indefinite detention is a possible consequence of cancellation, or whether there are provisions in the Act which prevent the person from making a valid visa application without the Minister's intervention

48. As a result of the visa cancellation, the applicant will no longer have a visa status to allow him to remain in Australia. He will become an unlawful non-citizen and will need to regularise his visa status.
49. The applicant will be subject to Section 48 of the Act, which means he will have limited options to apply for further visas in Australia and may be required to return to his country of origin (Thailand).
50. The applicant would be eligible to apply for a Bridging Visa to regularise his visa status. If granted a Bridging Visa it may allow him reasonable time to arrange to depart Australia.

51. As an unlawful non-citizen the visa holder may be liable for detention under Section 189 and removal under Section 198 of the Act if he does not voluntarily depart Australia.
52. The applicant will not incur any penalty under Public Interest Criterion 4013 to prevent the applicant from applying from overseas for a new visa if eligible. If the visa holder does intend to return to Australia in the future, they can apply for a visa in line with their new purpose for returning to Australia.
53. The Tribunal places no weight on this information in the applicant's favour.

54. **Whether any international obligations, including non-refoulement and best interests of the children as a primary consideration, would be breached as a result of the cancellation**

55. There is no indication that there would be a breach of any international obligations if the applicant's student visa was cancelled. The Tribunal places no weight on this information in the applicant's favour.

56. **Any other relevant matters**

57. There are no other relevant matters before the Tribunal.

58. **Conclusion**

59. Considering the circumstances as a whole, the Tribunal concludes that the visa **should** be cancelled.

DECISION

60. The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

61. Joseph Lindsay
Member

62.